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MANLEY O. HUDSON MEDAL


PROGRESS IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION LAW

By Jonathan I. Charney*

I. Introduction

Judgments of the International Court of Justice (ICJ) and awards of ad hoc arbitration tribunals carry special weight in international maritime boundary law. On its face, the international maritime boundary law codified in the 1982 Convention on the Law of the Sea is indeterminate. For the continental shelf and the exclusive economic zone, the legal obligation of coastal states is to delimit the boundary "by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."* The article on the delimitation of maritime boundaries in the territorial sea is no more determinate despite the fact that it makes direct references to the equidistant line, special circumstances and historic title. In spite of this indeterminacy, if not because of it, coastal states have found that third-party dispute settlement procedures can effectively resolve maritime boundary delimitation disputes. As a consequence, there are more judgments and awards on maritime boundary disputes than on any other subject of international law, and this trend is continuing.6

Owing to the relative scarcity of authoritative pronouncements, ICJ judgments and even ad hoc arbitration awards generally assume considerable importance in international law. In international maritime boundary law, the judgments and awards take on even greater salience. There are two reasons for this situation: first, the existence of a unique line of jurisprudence made possible by a continuing series of decisions and, second, the absence of clearer guidance from codifica-

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2 Id., Art. 15. The equidistant line is defined as "[a] line composed of relatively short segments connecting points that are equidistant from the normal baselines, or from claimed (or assumed) baselines from which the breadth of the territorial sea is measured. This is sometimes called a median line [when the coastlines are opposite]." INTERNATIONAL MARITIME BOUNDARIES at xix (Jonathan I. Charney & Lewis M. Alexander eds., 1993).

tion efforts, *opinio juris* and state practice. De facto, the International Court, with some assistance from ad hoc arbitrations, exercises substantial authority over international maritime boundary law. These tribunals take account of the jurisprudence on the subject and the state practice found in agreements settling maritime boundaries. The judgments and awards articulate and shape states' obligations in this regard. Even though there is no doctrine of *stare decisis* in international adjudication, it is not inaccurate to consider the impressive line of maritime boundary decisions as forming a common law in the classic sense. This jurisprudence, for example, has defined the method of analyzing these boundaries and has limited the considerations that may be taken into account when determining the boundary. Negotiated settlements, however, should be more influential since, in theory, a principal source of maritime boundary law ought to be customary international law grounded upon state practice as represented by the many relevant settlements. But this practice does not seem to be very instructive and, thus, is less influential than the adjudications. While the Court and arbitral tribunals are required to apply the law, coastal states have greater latitude when fashioning voluntary settlements. But this practice does not seem to be very instructive and, thus, is less influential than the adjudications. While the Court and arbitral tribunals are required to apply the law, coastal states have greater latitude when fashioning voluntary settlements. That may account, in part, for the diversity of these boundary settlements.

Nevertheless, international law is highly relevant to voluntary maritime boundary settlements. Developments in the jurisprudence strongly influence the course of interstate negotiations and the resulting delimitation agreements. Diplomats know that—more than for any other area of international law—resort to third-party dispute settlement is a real possibility for maritime boundary disputes. This awareness limits the positions they may credibly take during negotiations by devaluing those that would be untenable if presented for third-party dispute settlement. Based thus on circumscribed negotiating positions, the agreements reflect those restraints.

In an attempt to facilitate the contribution of state practice to international maritime boundary law, the American Society of International Law undertook a study of the existing settlements that was published as *International Maritime Boundaries*. To no one's surprise, few patterns of state practice and *opinio juris* have emerged from these settlements. While the augmented access to this information of foreign offices, courts and other tribunals may encourage the development of new law, at present the international judgments and awards have the leading oar in these murky waters.

Three recent international maritime boundary disputes decided by third-party dispute settlement forums provide an opportunity to examine the current state of the jurisprudence and its direction. These cases are *Delimitation of the Maritime Areas between Canada and France (St. Pierre and Miquelon)*, award of June 10, 1992; *Land, Island and Maritime Frontier (El Salvador/Honduras: Nicaragua intervening)*, Judgment of September 11, 1992; and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of June 14, 1993.

The *El Salvador/Honduras* case primarily involved disputes over the land boundary between the two Central American states. It also concerned the legal status of the Gulf of Fonseca and adjacent waters seaward in the Pacific Ocean (see map 1, above). The ICJ Chamber found the gulf to be historic internal waters.
II. THE CURRENT STATE OF THE LAW

A primary criticism of the current state of this law is its indeterminacy. International law does not require that maritime boundaries be delimited in accordance with any particular method; rather, it requires that they be delimited in accordance with equitable principles, taking into account all of the relevant circumstances of the case so as to produce an equitable result. The equitable principles are indeterminate and the relevant circumstances are theoretically unlimited. The indeterminacy of the legal rule was most graphically stated in the result-oriented words of the International Court of Justice in the Continental Shelf (Tunisia/Libya) case:

"It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by

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The message of this language seemed to encourage coastal states to assert whatever claims they wished on the chance that they could persuade their opponents or a third-party tribunal that equity was on their side. If international law is supposed to be normative, this formulation fell far short of the ideal.

The response to this articulation by the dissenting judges and writers was severe and may have prompted the more refined approach that followed shortly thereafter. In the Continental Shelf (Libya/Malta) case, the Court backed away from this extremely result-oriented approach:

Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.19

The message of the Court is clear. It does not hold out the possibility that a clearly determinative black-letter rule of law will be established. Nor should the maritime boundary law devolve to the point where it is so indeterminate that each delimitation is decided on an ad hoc basis comparable to a decision ex aequo et bono. Rather, in the common-law tradition as understood by the realists, the continuing series of judgments and awards should progressively refine the legal rules and their objectives. Over time, the essential normative objectives of this law may be better understood, notwithstanding the fact that they may not be adequately captured in a codification. Even though a new and highly determinative codification of the law is neither likely nor apt to be of much value, refinements in the application of the law may improve the normative situation. The improved situation, in turn, should produce results that are relatively consistent, fair and sensitive to the variety of circumstances in which maritime boundaries must be delimited. It should also encourage the settlement of maritime boundaries. The three recent cases identified above gave the international tribunals an opportunity to further refine the substantive and procedural law in this area.

My primary purpose in this article is to examine important issues addressed in these three cases. Since international maritime boundary law is complex and raises many issues, I have chosen to examine issues that have been prominent over time or are dealt with in unusual ways in the instant decisions. As will be seen, for the most part this trio, especially the Judgment of the full Court in the Jan Mayen case, has made important contributions to the field.

III. DEVELOPMENTS IN THE LAW

Procedure

Refinements in international maritime boundary law may be undertaken directly through the development of the substantive law itself. As will be discussed below, there has been some development of this kind. Equally, if not more importantly, progress has been made through refinements in the procedure used by tribunals to analyze boundary disputes. By setting the parameters of the proce-

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18 Transita/Libya, 1982 ICJ Rep. at 59, para. 70; see also Gulf of Maine, 1984 ICJ Rep. at 290, 312-13, paras 81, 156-58.
The tribunals have often shaped the results as well as the substance of the law itself. For some time now, these tribunals have taken a common approach to maritime boundary disputes. First, they define the relevant geographical area and the area in dispute. Second, they identify the relevant areas and coastlines. Third, they spell out all the relevant considerations. Fourth, they develop a provisional line based upon an analysis of the relevant considerations. Fifth, they check that line against some of the considerations to determine whether the line is "radically inequitable" and, if so, adjust it accordingly.

The award of the arbitration tribunal in the St. Pierre and Miquelon case followed this procedure. But it was challenged as circular by Prosper Weil, on the ground that, for the analysis to work, the factors entered into consideration in the final stage must have played a role earlier when the relevant considerations generated the provisional line in the first place. This problem may have been kept to a minimum in the Jan Mayen Judgment. The Court provisionally used the equidistant line, based strictly on coastal geography, before examining other considerations that provided it with a basis for adjusting the provisional line.

**Historical and Convention Rights**

The Jan Mayen case and Maritime Frontier Dispute have made clear that preliminary to a maritime boundary delimitation on the basis of the multistep analysis are questions of historic title, treaty obligations, common behavior and stability derived from the doctrine of *uti possidetis*. The Maritime Frontier Dispute case concerned both land and water boundaries. For much of the land boundary the Court applied the doctrine of *uti possidetis*. In its classic form, the doctrine requires that administrative boundaries used to allocate responsibilities among territorial subunits of a sovereign state will constitute boundaries of those territorial units if they gain independence. The doctrine promotes stability and serves to minimize the possibility of territorial conflicts after decolonization. The Court established in the instant Judgment that *uti possidetis* may be applied to international maritime boundaries.

In this case Honduras and the nonparty intervenor, Nicaragua, supported a boundary delimitation in the Gulf of Fonseca. Whether maritime boundaries were found in the gulf depended upon its legal status. The gulf is not a juridical bay. A juridical bay is one whose waters are considered to be internal because it contains landlocked waters and may be closed by a baseline (or series of baselines) not exceeding a total of 24 nautical miles. Such a bay may be found only on the coast of one state. Since three states abut on the Gulf of Fonseca—El Salvador, Honduras and Nicaragua—it does not qualify as a juridical bay. El Salvador argued that the gulf is a historic bay held in condominium by all three littoral states. The ICJ again favored stability consistent with the 1917 judgment by the Central American Court that the Gulf of Fonseca was a historic bay. The ICJ determined that the gulf was historic internal waters held in condominium by the three littoral states and was undivided except for a band of 3 nautical miles from the shoreline of each state. The dissolution of that condominium would require the agreement of all three states. Those states even held undivided interests in the maritime zones seaward from the mouth of the gulf in the Pacific Ocean (e.g., the territorial sea, contiguous zone, exclusive economic zone or exclusive fishery zone, and continental shelf). Maritime boundary delimitations in those areas also would require an agreement between the three states.

The question of stability and predictability in maritime boundary matters arose in the Jan Mayen (Denmark v. Norway) case where the ICJ had to determine the applicability of a 1965 maritime boundary treaty between the two states. On its face, the first article of the treaty might have disposed of the instant continental shelf boundary dispute. That article states:

"The boundary between those parts of the continental shelf over which Norway and Denmark respectively exercise sovereign rights shall be the median line which at every point is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each Contracting Party is measured."

Norway, of course, argued for the equidistant line to delimit the maritime boundary between tiny Jan Mayen and the lengthy eastern coastline of Greenland. Denmark argued in response that, despite the apparent generality of the article quoted above, the treaty was limited to the single North Sea maritime boundary described in detail in Article 2 of the five-article treaty. Each party put forward arguments relating to the interpretation of treaties in support of its position. In the end, the Court found the 1965 treaty to be inapplicable to the current dispute because Article 2 defined the boundary that was the object of the agreement, and thus excluded the Jan Mayen-Greenland maritime boundary.

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87 St. Pierre and Miquelon, 31 ILM at 1206-07, paras. 24-25 (Weil, arb., dissenting).
Norway also argued that an equidistant maritime boundary in the Jan Mayen area was already in place as a result of a variety of domestic and international actions of the two states ("conjoint conduct") utilizing the equidistant line. The Court accepted this theory but rejected it in the instant case, finding that Denmark had not intended any of the cited actions, individually or collectively, to commit it to the equidistant line in the Jan Mayen area. Even in that area Denmark's use of the equidistant line was found by the Court to reflect an effort to avoid conflict with Norway over the boundary pending a diplomatic settlement.

Stability is an important interest served by international law, particularly with respect to boundaries. The ICJ Judgment in the Jan Mayen case shows that the value of stability must be balanced against the authority of the states concerned to decide whether or not they will commit themselves to a particular boundary line. It also demonstrates the value of permitting states to employ de jure or de facto interim arrangements pending the establishment of a binding delimitation. Such arrangements enable states to make use of the disputed area and to conduct normal relations there. In the absence of such arrangements, states may feel compelled, at some cost, to forcefully challenge each other's actions in the area to maintain their legal rights. These interests support the establishment of a rule that denies relevance to de facto and de jure interim arrangements in maritime boundary dispute settlement proceedings. Such a rule should be preferred even though the arrangements may reflect the true rights and interests of the disputants and the rule itself may result in a decision that upsets the status quo. It seems to me that the Court got the balance right in the Gulf of Fonseca and Jan Mayen Judgments.

Nongeographic Considerations

In the Libya/Malta case, the ICJ underscored the significance of distance in delimitations of continental shelf areas located less than 200 nautical miles from the coasts of the states, in question. It cast serious doubt on the relevance of considerations such as geology, geomorphology, economics, population and other social science data in maritime boundary delimitations affecting the 200-nautical-mile exclusive economic zone or fishery zone, or even the continental shelf underlying such zones. What appeared to remain was the geography of the relevant coastlines. Despite this clear signal from the Court, France and Canada in the St. Pierre and Miquelon arbitration placed nongeographic arguments before the tribunal. The panel did not rely on these arguments as a basis for the delimitation.

Similar considerations were raised again in the Jan Mayen case. Both Denmark and Norway presented formidable arguments to establish the historic and contemporary importance of the resources in the disputed waters between Greenland

37 Id. at 53-56, paras. 33-40.

38 Id. at 54-55, paras. 35-36.


41 St. Pierre and Miquelon, 31 ILM at 1173-74, paras. R-L 01.
boundary in this zone, therefore, appears to have been placed to give to the disputing states’ fishing industries half the value of today’s commercially exploit-
able fishery. This decision is hard to reconcile with the position taken by the Court elsewhere in the Judgment that “the attribution of maritime areas to the
territory of a State, which, by its nature, is destined to be permanent, is a legal
process based solely on the possession by the territory concerned of a coastline.”

The determination of the boundary in zone 1 appears to have reintroduced socio-
economic considerations into maritime boundary law, a result strongly criticized
by Judge Schwebel in his separate opinion. On the other hand, the proscribed socioeconomic considerations may be nar-
rowly defined to focus on the relative economic strengths and requirements of the
populations in settlements adjacent to the area in dispute. The deiimitation
should not be designed to compensate them directly for their relative poverty or
dependence on the resources in question. If so defined, the Court did not directly
argue Collowed natural boundaries between the resources. It also refused
to base maritime boundary lines on these considerations. Not only is it

part of the area of overlapping claims.” Id. at 75, para. 78. It also found that ice “constitutes a
considerable seasonal restriction of access to the waters.” Id.

In this case, neither state could argue that inhabitants of the adjacent coasts had a particular
dependence on the fishery. Norway’s Jan Mayen has no permanent population. The Norwegian fishing
boats travel long distances from the mainland to exploit the capelin. The eastern coast of Green-
land adjacent to the area is substantially ice locked and has a relatively small population. Greenland’s
fishing is carried out by fishermen who live on its western coast and travel long distances to reach the
area. Greenland also contracts with foreign fleets to exploit these fisheries. Ed. at 71, para. 74; 1 Nor.
Counter-Memorial, supra note 30, at 12-13, paras. 44-46; 1 Den. Reply, supra note 31, at 51-54,
paras. 131-38.


Id. at 120 (Schwebel, J., sep. op.). Judge Schwebel’s separate opinion contrasts quite sharply with
that of an earlier U.S. judge on the Court, Philip Jessup. In his separate opinion in the Sea
North Continental Shelf cases, Jessup suggested that the Court and the parties should delimit the maritime
boundary by focusing on the real basis of the dispute—access to hydrocarbons in the seabed of the
hereinafter North Sea] [Jessup, J., sep. op.].

In the Gulf of Maine case, the Chamber delimited the maritime boundary on the basis of coastal
gography, causing the valuable resources to be divided. It refused to draw the line in ways that might
have followed natural boundaries between the resources. It also refused to adjust the boundary on the
basis of economic dependence of coastal communities, but the boundary that was adopted gave both

They have, however, allowed for their use in extraordinary cases. Consequently, the United States

make use of those arguments when delimiting the maritime boundary. Id. at 272-78, 326-27, 342-
44, paras. 41-59, 191-95, 236-41.

A permanent boundary may be ambulatory. Thus, a maritime boundary strictly based on the
equidistant line generated from the coastline will change as the coastline changes. States have rejected
this possibility in their maritime boundary settlements by permanently fixing their boundaries. In this
area stability is preferred. David Colson, The Legal Regime of Maritime Boundary Agreements, in
INTERNATIONAL MARITIME BOUNDARIES, supra note 2, at 41, 42; Louis B. Sohn, Baseline Considera-
tions, in id. at 154, 155-58; Leonard Legault & Blair Hankey, Method, Opposition and Adjacency,
and Proportionality in Maritime Boundary Delimitations, in id. at 201, 206-14. This is best illustrated
by the agreements between the United States and Mexico, where the parties developed a solution to connect the fixed maritime boundary to the ambiguously defined territorial sea. Id. at 451-58.

Even the land boundary rule of the thalweg seeks a certain stability—the stability of one clearly
define d use, navigation—at the expense of some limited loss of geographic stability. In maritime
boundary matters it is rare to find such a dominant nongeographical interest. In those rare situations
states have favored joint management and other mutual arrangements in the context of geographi-

cally fixed limits. See Barbara Kuczewska, Economic and Environmental Considerations in Maritime
Boundary Delimitations, in id. at 75, 81-96; Colson, supra, at 55-60.

Elch, supra note 10, at 163, 180-83; Beazley, supra note 52, at 243.

1992 LOS Convention, supra note 1, Art. 57.

Kwiatkowska, supra note 52, at 75; Colson, supra note 52, at 55-60.

Report and Recommendations to the Governments of Iceland and Norway of the Delimitation
Commission on the Continental Shelf Area between Iceland and Jan Mayen (May 1981), 65 I.M.R.
Mayen), Report No. 9-4, in INTERNATIONAL MARITIME BOUNDARIES, supra note 2, at 1754.

The Delimitation Commission had the latitude to recommend a joint development zone that authority is
difficult to find credible evidence to support a boundary that reconciles these
factors, but resource interests and human activities change over time, making a
permanent delimitation constructed to accommodate them untenable. Similarly,
international forums have been unable to delimit maritime boundaries on the
basis of geologic considerations because of the uncertainties of that science, the
difficulty of adapting it to international maritime boundaries that require rela-
tively precise delimitation, and the minimal relevance of such considerations to
temporary international relations. That may be why the international com-
munity was willing to establish the 200-nautical-mile line in the 1982 LOS Conven-
tion. Maritime zones and boundary delimitations established on the basis of
coastal geography, distances measured from the coastline, and proximity more

closely reflect states’ interests in spatial-based authority and control and their
preference for maximization of the physical separation between states, as viewed
from the two-dimensional perspective of the earth’s surface.

Nevertheless, the human and resource impacts of maritime boundary delimita-
tions cannot be ignored. Coastal states that do enter into maritime boundary
agreements often deal with these impacts in separate agreements designed to
complement the boundary settlements. This practice is understood by third-
party forums that decide maritime boundary disputes. The foremost example
involved the continental shelf boundary between Iceland and Jan Mayen (Nor-
way). There the conciliators recommended, and the parties accepted, a joint develop-
ment zone on the continental shelf and a maritime boundary located at the
200-nautical-mile limit, as measured from the Icelandic baseline. The ICJ
Chamber in the Gulf of Maine case pointed out that the United States and Canada
had traditionally and successfully resolved fisheries management issues jointly
through international agreements. The arbitration tribunal in the *St. Pierre and Miquelon* award found that Canada and France had engaged in the same practice. Similarly, both litigants in the *Jan Mayen* case acknowledged their historic cooperation on fisheries management in the region. Denmark argued that the delimitation was needed primarily to settle the spatial jurisdiction of the two states to enable them to calculate national areas for management and make quota decisions important to reaching mutually acceptable arrangements. Norway maintained that the maritime boundary dispute was not an obstacle to the successful implementation of fisheries agreements between the parties.

In my opinion, the general rejection of considerations other than coastal geography in maritime boundary delimitation cases is the preferable course. The re-introduction of other considerations, albeit in a limited and indirect way, in the *Jan Mayen* judgment is unfortunate and likely to encourage greater conflict and uncertainty. It may slow the evolution of more stable law. Natural resource, environmental and similar concerns may be best addressed on their own merits in light of, but apart from, the boundary delimitation.

**Islands**

In the *Libya/Malta* case, a delimitation between the small islands of Malta and the large mainland territory of Libya, the ICJ primarily focused on the geography of the opposite coastlines of the two states. But it also considered the regional perspective and the presence of Italy just north of Malta. The Court left open the question of how islands standing alone may be treated. In both *St. Pierre and Miquelon* and *Jan Mayen*, islands completely separated from the main territory of the metropolitan state faced large mainland territories. The decisions did not question the entitlements of these islands. Rather, they placed primary emphasis on the relevant coastal fronts of these islands, despite their substantially shorter length than those of the opposition. Nor were the decisions influenced by the relative sizes, populations or economies of the islands. Thus, desolate *Jan Mayen*, with no permanent population or economy, was the recipient of a delimitation provisionally based on its coastal front, modified by proportionality and a division to give Norway equal access to an area of prime fishing. Similarly, the small-island status of *St. Pierre and Miquelon* was not itself found to be an impediment to maritime entitlements.

**Proportionality**

The *St. Pierre and Miquelon* and *Jan Mayen* cases raised several other fundamental maritime boundary concerns. As the reader will recall, the Court and other tribunals have regularly identified the area relevant to the boundary delimitation so as to form the geographic context for the boundary analysis. At least at the final stage and sometimes at an intermediate stage, these tribunals have examined the delimitation from the perspective of proportionality. Thus, they have estimated roughly or calculated exactly the relative lengths of the relevant coastlines and compared that ratio to the ratio of the provisionally delimited relevant water areas. If the proportion of the relevant water areas did not roughly coincide with the relative lengths of the coastlines, further analyses or adjustments would be considered. There is no doubt that, especially within the 200-nautical-mile limit, this proportionality consideration is particularly useful. While it may not be helpful in all cases, it is appropriate to include it as an element of analysis in all cases.

In the *St. Pierre and Miquelon* award, the arbitrators analyzed proportionality in detail and followed a classic approach. The primary difficulty found here, as in most other cases, was defining the relevant coasts and maritime areas when the delimitation takes place in a relatively open area. The tribunal set the stage for this analysis by identifying the "relevant area," which the parties agreed was the geographical concavity framed by the Canadian coasts leading from the open Atlantic Ocean to the Gulf of St. Lawrence (see map 2, p. 231). Within that area the tribunal considered simplified straight-line segments of the coastline drawn between salient turning points. The relevant coastline segments were deemed to be those whose seaward projection (a vector perpendicular to the simplified coastline segment) pointed toward the relevant area, were not blocked by another segment of the relevant coast, and were located less than 400 nautical miles from the relevant coasts of the other state. By this process the tribunal calculated that the ratio between the relevant coasts was 15.3:1 (Canada:France). The tribunal called...
culated the relevant maritime area on the basis of the 200-nautical-mile limit generated by the Canadian and French coastlines that project into the area, a line drawn due south from the easternmost point on the relevant coastline at Canada’s Cape Race, and a line from the westernmost point on the relevant coastline at Canada’s Cape Canso southeast to the 200-nautical-mile limit. On this basis the tribunal determined that the maritime boundary line it had constructed produced a ratio of areas of 16.4:1 (Canada:France). Its variance from the ratio of the relevant coastlines (15.3:1) was determined not to be impermissibly disproportionate.

It is rare that the relevant coastlines and areas will automatically be identified in a maritime boundary delimitation. A certain amount of judgment is necessary if a mathematical calculation of proportionality is to be attempted. In this respect, the tribunal tried to approach this analysis in a principled way, adopting the concept of projections from simplified segments of the coasts, the 200-nautical-mile limit, and straight lines connecting the extremes of the relevant coastlines to that limit. As one of the arbitrators, Prosper Weil, argued, these choices were critical and controlled the results. Little justification was given for using these techniques, as well as for the decision to analyze the delimitation from a wide geographic view rather than by focusing on a more limited area. The tribunal’s approach is somewhat unusual, but it does represent an effort to apply proportionality in a principled way. If further elaborated in future cases, proportionality may become more than a pseudo-mathematical technique by which results reached on other grounds are rationalized.

The Jan Mayen case presented the ICJ with an occasion to clarify the role of proportionality analyses. Denmark (Greenland) based its position largely on such an analysis, while Norway (Jan Mayen) avoided its use altogether, even refusing to identify the relevant coastlines and areas. Notwithstanding Norway’s refusal, the Court did focus on proportionality. Early in the Judgment, the Court identified the relevant coastlines and defined the relevant water areas. Later, the Court measured the lengths of the relevant coastlines directly and on the basis of straight lines drawn between the points marking the geographical limit of those relevant coastlines. It determined that the ratio between the relevant coasts of Jan Mayen and Greenland was approximately 1:9 (Norway:Denmark). On this basis alone, the Court found that the substantial disparity in the coastline lengths constituted a relevant circumstance, as well as a special circumstance, that argues against the use of the equidistant line and in favor of another solution—a line drawn closer to Jan Mayen than the equidistant line. It did hold, however, that a delimitation dividing the area in the same ratio as that found for the relevant coastlines was not required. A line drawn at the 200-nautical-mile limit from the coastline of Greenland (its maximum entitlement) was rejected even though it would produce an area ratio of only 1:6 (Norway:Denmark). The Court opined that it would be inequitable on the basis of other relevant considerations to permit Greenland (Denmark) its full 200-nautical-mile entitlement and to leave Jan Mayen (Norway) with the remaining 50 nautical miles between them. Equity required that each state obtain less than its full entitlement. The ICJ went on to delimit the boundary by a line that divided the area of overlapping entitlements by a ratio of 1:3 (Norway:Denmark). By crafting a solution that produced a division of the water area so different from the coastline proportions (1:9), the Court seems to have diminished the importance of proportionality. As the Court itself pointed out, previous cases had considered much smaller differences to be a basis for adjusting the boundary line (e.g., the Gulf of Maine case).

The Court compounded the capriciousness of its proportionality analysis by focusing only on its division of the water area separating the maritime boundary lines claimed by the two parties before the Court—the 200-nautical-mile line drawn from the Greenland coastline claimed by Denmark and the equidistant line claimed by Norway (the area enclosed by lines connecting points AIJBCMDLK on map 3, p. 232) —not the entire relevant area (i.e., that enclosed by lines connecting points AEFCGMN on map 3). By framing the division in that way, it encourages future disputants before the Court to persist in their maximum boundary claims in hopes of influencing this proportionality calculation. At best, the Court appears to have stressed the uniqueness and individuality of its approach to the case, even while emphasizing the value of developing a more determinative norm through state practice and third-party settlements. By implication, this approach strengthens arguments for novel analyses and delimitations in every case.
Equidistance.

The goals of consistency and predictability may be further promoted by resolving another debate in international maritime boundary law. In the past, the Court has gone quite far in trying to establish that the equidistant line is not the preferred method of delimitation. Here, too, the Jan Mayen case was in point. Article 6 of the 1958 Convention on the Continental Shelf contains the infamous equidistance/special circumstances rule. In Jan Mayen Norway favored the application of Article 6 to delimit the continental shelf boundary because the article allegedly gave preference to the use of equidistance. Denmark argued the opposite. One would have thought that this debate had been settled by the award in the United Kingdom-France Continental Shelf arbitration, where the equidistant/special circumstances rule of the 1958 Continental Shelf Convention was found to be indistinguishable from the general international law rule, which gives no special preference to equidistance. The Court made clear in the Jan Mayen case that it accepted this view: an analysis based on that Convention will be identical to the general international law analysis. Both seek to produce an equitable result. Furthermore, "special circumstances" under the Continental Shelf Convention produce the same result as "relevant circumstances" used in general international law. This convergence was supported by the evolution of the general international law in relation to which the Continental Shelf Convention is to be interpreted. As a consequence, the Court adopted the reasoning of the tribunal of arbitration in the Anglo-French case, which it quoted with approval.

that the relevant coastlines were 24 miles:192 miles (Malta/Libya), it determined that the (modified) equidistant line failed to reflect the substantial disproportionality in the coastal lengths. Consequently, an adjustment was required. Id. at 50, para. 68. After considering the wider geographic area and without attempting to calculate maritime areas attributable to the disputants, the Court decided to shift the provisional (modified) equidistant line north toward Malta three-quarters of the distance between the provisional line and another hypothetical equidistant line constructed between the coastlines of Libya and Italy (without regard to the Maltese coastline near the Italian coast to the south). Id. at 51-53, para. 71-73. The Court found that this result was consistent with proportionality. Id. at 53, para. 74. See Jan Mayen, 1991 ICJ Rep. at 125-26 (Schwebel, J., sep. op.).

Equidistance.

Article 6 of the 1958 Convention on the Continental Shelf, supra note 4., states, in part:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.


6. As with previous cases where equidistance played a significant role, the boundary to be delimitated was between opposite coastlines. Furthermore, for the first time the Court had before it a maritime boundary delimitation in which the 1958 Convention on the Continental Shelf was directly applicable. Both states were parties to the Convention and the Court was called upon to delimit the continental shelf. In the earlier Gulf of Maine case, the United States and Canada were also parties to the Convention, but the Court was required to delimit a single maritime boundary. Rather than a single maritime boundary, however, the Jan Mayen case called for delimitations of both the continental shelf and of the fishery zones in the superjacent waters. On this basis alone, the Court might have relegated the equidistance principle to delimitations of the continental shelf only. It did not do so. Rather, equidistance was given consideration throughout. It thus appears that, as a theoretical matter, the Court took equidistance out of the cellar and gave some recognition to its logic and importance in maritime boundary delimitations of the continental shelf, as well as those of exclusive fishery and economic zones, and of single maritime boundaries. On the other hand, it felt free to jettison equidistance so that it could craft an alternative line in the instant case.

In St. Pierre and Miquelon, a case of adjacency, equidistance was rejected because it would produce a division of the area considerably different from the coastline ratio and the seaward projection of the Canadian coastline. This tribunal also treated the rule of the Continental Shelf Convention as identical to the rule of general international law governing delimitation of the maritime boundary in the continental shelf and superjacent waters.

The information collected in International Maritime Boundaries demonstrates that equidistance easily exceeds all the other methods of maritime boundary delimitation in frequency of use. It is a valuable method and often serves as a useful basis for beginning the analysis of a dispute. It figured prominently in several earlier third-party delimitations of maritime boundaries, particularly those involving opposite coastlines like the Libya/Malta and Gulf of Maine cases. Nevertheless, the ICJ was wise to make clear that the equidistant line is not mandated by the law. This effort has had its appropriate result in freeing the law and practice from any obligation or presumption favoring equidistance. Its success now permits the Court and coastal states to make further use of the equidistant line in appropriate cases as the boundary line or as one basis for analyzing the maritime boundary situation.

The Single Maritime Boundary

Substantial progress was made in the direction of a single maritime boundary for all offshore zones in the Libya/Malta case when the Court found that coastal geography and distance were the principal relevant considerations in this re-

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7. 1993 ICJ Rep. at 505, para. 4 (Fischer, J., ad hoc, dissenting).
12. 51 ILM at 1162, 1168, 1169, 1176, paras. 33, 35, 62, 64, 93.
13. Legault & Hankey, supra note 52, at 203, 221; Charney, supra note 2, at niv.
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cases—those in which detailed resource management solutions are crafted. It is practical for the Court to establish a single line even though some difficulties de jure may be presented.

Maximum Reach

Another trend that may exist in fact, if not in law, is exhibited by the tribunals: to delimit maritime boundaries so that all disputants are allotted some access to areas approaching the maximum distance from the coast permitted for each zone. This trend received an early start in the 1969 North Sea Continental Shelf cases where the Federal Republic of Germany was released from the cutoff effect of the equidistant line generated by the coasts of its neighbors. The ultimate solution, which was based on the Court's Judgment, took the form of an agreement giving the Federal Republic a seaward window that approaches the middle of the North Sea and connects directly with the opposite zone of the United Kingdom. No subsequent award or judgment has had the effect of fully cutting off a disputant's access to the seaward limit of any zone. Thus, while Malta was not able to get a boundary equidistant from the Libyan and Maltese coasts, it got something close to it. In the recent Gulf of Fonseca Judgment, the Court avoided subjecting Honduras to a cutoff effect in the gulf by finding a historically established, undivided condominium there. The Court also recognized a right of all the littoral states to a share of the zones in the ocean seaward of the gulf closing line.

In the St. Pierre and Miquelon case, the tribunal awarded the small French islands close to the coast of Canada a very narrow corridor, which it construed seaward from their coastline to the 200-nautical-mile limit. Certainly, proportionality and other considerations could have been equally well met by a more compact and manageable delimitation. The tribunal appeared to place value on access to a lengthy corridor seaward, even though the corridor may be too narrow for French commercial fishing. Since the corridor does not seem to include a

98 North Sea, 1969 IJC REP. at 45, para. 81.

99 See the case study of this matter in D. H. Anderson, Federal Republic of Germany—United Kingdom, Report No. 9-12, in INTERNATIONAL MARITIME BOUNDARIES, supra note 2, at 1851; D. H. Anderson, Denmark—Federal Republic of Germany, Report No. 9-8, in id. at 1801; D. H. Anderson, Federal Republic of Germany—The Netherlands, Report No. 9-11, in id. at 1833 and map (Regional Overview North and West Europe, Region Number 9), in id. at 343.

100 See the case study of this matter in Tullio Scovazzi, Libya-Malta, Report No. 8-8, in INTERNATIONAL MARITIME BOUNDARIES, supra note 2, at 1649.

101 Maritime Frontier Dispute, 1992 IJC REP. at 606-09, paras. 415-20. If the area seaward of the gulf is divided by maritime boundaries, Honduras may find itself with a long, thin corridor sandwiched between El Salvador and Nicaragua.

102 See 31 ILM at 1169-71, paras. 66-74. See also Jonathan I. Charnley, Canada-France, Report No. 1-9, Addendum, in INTERNATIONAL MARITIME BOUNDARIES, supra note 2, at 399. The corridor runs south from the islands, reflecting the direction of their coastal front. While this cardinal direction is hard to justify on the basis of coastal geography, cardinal directions have been used elsewhere. See Legault & Hankey, supra note 52, at 207, 211-12. An 86-km.-long and 3,169-km.-wide maritime boundary was established by the France-Monaco agreement of Feb. 16, 1964. Tullio Scovazzi, France-Monaco, Report No. 8-3, in INTERNATIONAL MARITIME BOUNDARIES, supra, at 1580.

103 In some rare cases, states have drawn maritime boundaries that create narrow corridors. See Scovazzi, supra note 107, at 1581; Tullio Scovazzi, Cyprus-U.K. (Akrotiri, Dhekelia), Report No. 8-1, in INTERNATIONAL MARITIME BOUNDARIES, supra note 2, at 1559; Kaldone G. Nweibed, Dominica—France (Guaillabou and Martintique), Report No. 2-15, in id. at 705; and Kaldone G. Nweibed, Netherlands (Antilles-Venezuela), Report No. 2-12, in id. at 615. See also Higgin, supra note 10, at 1546.
valuable fishery, the tribunal appears to have focused on the delimitation of area, as opposed to economic and resource-based interests. Viewed another way, the tribunal denied France a victory in regard to its economic objective—access to substantial fisheries. As a consolation, the tribunal awarded France the symbolic victory of an area reaching seaward toward the 200-nautical-mile limit. This delimitation may make fisheries and resource management in the area difficult without agreements between France and Canada.

The Jan Mayen case presented a similar issue. Although both states and their related territories have undisputed access to the full 200-nautical-mile limit in areas adjacent to the area disputed in the case, access to the middle of the waters between Greenland and Jan Mayen was at the core of the controversy. Denmark (Greenland) sought a full 200-nautical-mile zone in the area directly between the two territories, limiting Norway (Jan Mayen) to a maximum of about 50 nautical miles in that area. On the other hand, Norway claimed an equidistant line that would equally split the distance separating the two territories. Denmark's geographical argument was based principally upon the short coastline of Jan Mayen and the island's territorial insignificance, as opposed to the extremely long coastline of eastern Greenland.

It was impossible to give both coastal states access to the full 200-nautical-mile limit of their potential entitlements in the disputed area. The Court could have given each such access in different parts of the area, but that solution was not even mentioned in the Judgment. It could have awarded Denmark its full 200-nautical-mile claim, limiting Norway to the remainder, but this option was rejected, notwithstanding that this division would have more closely reflected the relative lengths of the relevant coastlines than the solution in the Judgment. The rejection of the line based on Denmark's claim apparently stemmed, in part, from the desire of the Court not to cut off either state's access to the middle of the area. It could even have selected the equidistant line, which, by definition, would run through the middle of the waters separating Jan Mayen and Greenland, giving both states equal access to the disputed area. Although the Court adopted the equidistant line provisionally, in the end it delimited the boundary by drawing a line between the equidistant line and the 200-nautical-mile line that was the limit of Denmark's entitlement (line AONM on map 3, p. 232). Thus, Norway was given limited geographical access to the middle of the disputed area. This result can be explained by the substantial differences in the lengths of the relevant coastlines; the presence of pack ice, which often prevents vessels from reaching much of the area; and the limited region in which commercial fishing has taken place in recent years. Furthermore, in other nearby areas both territories have access to their full 200-nautical-mile entitlements. These facts may make the Jan Mayen case unusual.

The interests to be served by the idea of maximum reach are not clear. The idea may be viewed as geographical and status based, meaning that the coastal state's offshore zones are not limited to areas near the shore but, rather, run a considerable distance seaward like those of its better-situated neighbors. It may even reflect an interest in having rights in an area, albeit limited, which would permit the state to participate in international arrangements as an equal. This interest may have motivated the Federal Republic of Germany in the North Sea Continental Shelf cases. Alternatively, maximum reach may relate to navigation and other kinds of access to the high seas or the waters of third states. In that sense it may be connected to security interests in transportation and mobility. This was certainly the interest that was pressed by the United Kingdom for the Channel Islands in the Anglo-French case but rejected in the award.

The recent cases do not even acknowledge this consideration, much less its core values. In St. Pierre and Miquelon, the long corridor may have served some status interests of the French, but this benefit appears to be limited. As for French navigational and security interests, they do not appear to be threatened, even though the islands are deeply tucked into the Canadian coast. As a matter of law, France's access to and from the islands is protected even without the corridor. If French security or navigational interests were at risk, the corridor could be of value, but only if it reached the high seas beyond all Canadian zones. As described in the award, the corridor does not reach that point since the tribunal believed that its jurisdiction did not reach further seaward. Although navigation and security were not implicated in the Jan Mayen case, status and participation were important to Norway. It had enjoyed a long history of resource exploitation in the area and laid claim to equal status and participation. These interests could be recognized, however, without granting Norway rights to the geographic middle of the area between Jan Mayen and Greenland. In the Gulf of Fonseca case, both interests were at the core of Honduras's maritime claims. Absent a condominium, the maritime boundary delimitation might well have cut off all Honduran maritime zones at a location substantially landward of the mouth of the gulf, obviating distant reach. That result could have precluded Honduras's exploitation of the marine resources immediately outside the gulf (and perhaps within it) and might have created access problems for navigation, overflight and security. From the perspective of the two categories of interests served by maximum reach, the three cases were correctly decided. It is unfortunate that the analyses paid scant attention to this apparently important consideration.

The Wider Perspective

Third states. Despite the similarities and convergencies of the three new cases that are the focus of this article, the ICJ and arbitration panels often have been

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109 See Gélinas, supra note 58; and Valerie Hughes, Remarks at "The Law of the Sea: Recent Delimitation Cases," supra note 9, at 227.

110 The tribunal refused to decide whether the French corridor would go beyond 200 nautical miles from the coastline of St. Pierre and Miquelon. This seaward access for St. Pierre and Miquelon may not, however, be unlimited since the area beyond 200 nautical miles from the French islands is within 200 nautical miles of the Canadian coastline of Nova Scotia and Newfoundland. Thus, the French zone may be encapsulated within the Canadian coastal zones. St. Piere and Miquelon, 21 ILA at 1171-73, paras. 75-82.


112 Denmark (Greenland) sought the same maritime boundary solution that was reached in the maritime area between Iceland and Jan Mayen (Norway). Iceland obtained its full 200-nautical-mile entitlement and Jan Mayen was left with the remainder, which was far less than its full 200-nautical-mile potential entitlement. Iceland/Norway, supra note 56; Den. Memorial, supra note 38, at 91-92, para. 289; Anderson, supra note 56, at 1755. The ICJ, however, produced a maritime boundary in the Greenland—Jan Mayen case that is marginally set off from the equidistant line to favor the state with the longer relevant coastline (Denmark), just as it did in the Libya/Malta case. See Scovazzi, supra note 111, at 65-69, paras. 61-70. See the discussion in the subsection "Proportionality," supra p. 241.
reluctant to look beyond the dispute before them to relationships with nearby states, regional implications of the delimitation, and other maritime boundary settlements involving similar circumstances. This reluctance serves the autonomy interests of states but handicaps the community's interests in the coherent resolution of maritime boundaries and impedes a common-law progression toward a more coherent body of maritime boundary law.

Maritime boundaries do not always involve the interests of only two states. Often several states have maritime space interests that intersect or overlap with each other. Thus, maritime boundaries separating the maritime zones of three states have been negotiated to meet at tri-points.\(^{117}\) Third states have also attempted to intervene in adjudications involving two states. Although Italy's application to intervene in the *Libya/Malta* case was denied, its efforts were rewarded when the ICJ excluded from consideration maritime areas claimed by Italy as against the parties to the litigation.\(^{118}\) In *Maritime Frontier Dispute*, the ICJ Chamber granted Nicaragua the right to intervene as a nonparty.\(^{119}\) While Nicaragua was permitted to express its views on the issues involving the Gulf of Fonseca, the Chamber held that Nicaragua was not legally bound by the judgment.\(^{120}\)

Most maritime boundaries established by agreement are the product of bilateral negotiations. Third-party procedures also are usually limited to boundaries between two states. Maritime boundaries, however, must be seen as well in a regional context in which other states' maritime zones may be relevant. International tribunals have considered the regional context even when only two states were before them. The tribunal in the *Guinea/Guinea-Bissau* arbitration was most explicit in this regard.\(^{121}\) The ICJ has considered the regional perspective in maritime boundary delimitations in the Mediterranean Sea.\(^{122}\) Nevertheless, the Court has been reluctant to permit neighboring states to intervene in such cases even though the claims of the parties may overlap those of a third state.\(^{123}\) The only exception to this practice was in the *Maritime Frontier Dispute* case, where Nicaragua was permitted to intervene under Article 62 of the ICJ Statute on the basis that it had "an interest of a legal nature which may be affected by the Chamber's decision on the question of the existence or nature of a régime of condominium of community of interests within the Gulf of Fonseca."\(^{124}\) In contrast, the Court decided that if no condominium were found, the mere fact that a delimitation might be related to Nicaragua's boundary claims would not be a sufficient basis for intervention.\(^{125}\) This latter determination is consistent with prior judgments denying intervention to states concerned about the effects of a judgment delimiting a maritime boundary between their neighbors.\(^{126}\)

As mentioned above, one request to intervene did lead the ICJ to exclude areas claimed by the third state from the adjudication.\(^ {110}\) Even in the exceptional case where intervention may be allowed, unless there is a particular basis for jurisdiction, the intervenor will not be granted party status. The judgment will not be res judicata in regard to that third state.\(^ {118}\) At most, the intervention provides the Court and parties with the benefit of the views of the third state without imposing any obligations on it (much like an amicus curiae). Since third-party dispute settlement procedures require the consent of the participating parties, a liberal approach to third-state intervention is unlikely. Nevertheless, many maritime boundaries ought to be seen in a regional context in order to avoid additional conflict and confusion.\(^ {129}\) Express consideration of that context along the lines of the *Guinea/Guinea-Bissau* award should be emulated and, perhaps, greater encouragement should be given to third-state participation.\(^ {130}\) In a sense, the ICJ promotes greater involvement by excluding areas claimed by third states from consideration. This practice could be seen as *de facto* making the interested third state a necessary party, and might encourage states in the future to include closely related third states in the dispute settlement process.\(^ {131}\)

Other boundary settlements. In the Jan Mayen case between Denmark and Norway, the former sought to invoke as a specially relevant precedent the maritime boundary established between Iceland and Norway (Jan Mayen) by conciliation and agreement. That boundary allowed Iceland a full 200-nautical-mile continental shelf and fishing zone between it and Jan Mayen, which limited Norway to the remaining 106 nautical miles separating them.\(^ {127}\) Denmark argued that the critical elements of coastal geography in the Greenland/Jan Mayen situation were essen-

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117 See Beazley, supra note 52, at 243, 256-59; Colom, supra note 52, at 41, 61-62.
127 The ruling denying Italy's request to intervene in the *Libya/Malta* case drew five dissenting arguments for a more liberal application of the right to intervene in maritime boundary cases. See dissent of Judges Seite-Camara, Oda, Ago, Schwebel, and Jennings in *Continental Shelf* (*Libya/Malta*), Application to Intervene, 1984 ICJ Rep. at 71, 90, 115, 131, 148, respectively. See generally Lori Fisler Damroth, *Multilateral Disputes*, in *INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 377 (Lori Fisler Damroth ed., 1987).
itially indistinguishable from the Iceland/Jan Mayen situation.138 In the face of those arguments, Norway maintained that the maritime boundary agreement with Iceland was based largely on political considerations (especially Iceland’s heavy dependence on fishing and lack of other potential hydrocarbon resources) and other quid pro quos; thus, it should not serve as a relevant precedent.134

The Court rejected the relevance of the Iceland/Jan Mayen settlements as a basis for delimiting the Greenland/Jan Mayen boundary by a 200-nautical-mile line drawn from Greenland’s coastline.135 It did, however, limit the relevant area in the south by the Icelandic 200-nautical-mile line.136 By rejecting the relevance of the Iceland/Jan Mayen maritime boundary settlement, as well as the Denmark/Norway settlement of the maritime boundary in the Faroe Islands137 and the Norwegian actions regarding Bear Island,138 the Court stressed the uniqueness of each maritime boundary delimitation, the freedom of states to use different methods for different boundaries, and the rights of states to take political considerations into account when reaching a maritime boundary settlement.

Even though these are legitimate values, the Court’s emphasis on autonomy and uniqueness may have gone further than necessary in the instant case. By casting off highly similar settlements for all aspects of its analysis, the Court further diminishes the role of state practice in this area.139 Even though every boundary has unique elements and political considerations do intrude, prior settlements may help the Court appreciate the values and methods taken into account in similar situations.

By basing its decision to disregard the Iceland/Jan Mayen agreement in the context of the Greenland/Jan Mayen dispute on the ground that it was the product of a political compromise, the Court necessarily accepts the proposition that all maritime boundary settlements are irrelevant to other delimitations. Although factual and political circumstances do vary, there are also common elements among maritime boundary agreements that will help to inform diplomats, judges and arbitrators called upon to resolve controversies and to restrain states from overreaching.140 The ICJ should acknowledge this value with a view to furthering “the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.”141

From the perspective of coastal geography, the Iceland/Jan Mayen maritime boundary was indubitably relevant to the Greenland/Jan Mayen dispute. In the Iceland case, the very short coastal front of Jan Mayen faced the substantially larger coastal front of Iceland. Iceland obtained its full 200-nautical-mile entitlement and Norway received the remainder. The fact that the Icelandic coastline facing the area is shorter than the relevant Greenland coastline suggests that the Danish claim against Norway may be geographically stronger than Iceland’s. Since coastal geography is preponderant in maritime boundary delimitation law, the Iceland settlement should have been more thoroughly considered in the Greenland case, notwithstanding the potential relevance of other considerations.142

The ICJ and other tribunals sitting on maritime boundary matters ought to begin to bring together the lines of state practice. While state practice has been put forward in many maritime boundary cases, tribunals have often treated information superficially.143 Thus, in Jan Mayen the parties adverted to a variety of maritime boundary settlements that they maintained were representative of state practice in support of their positions.144 They had a full opportunity to comment on each other’s evidence.145 This access to the relevant state practice placed the Court in an advantageous position to follow up its declaration in the Libya/Malta case with results predicated upon an acknowledged analysis of the state practice. By this step the ICJ would have promoted both attention to prior practice and a convergence of state practices that would further the “consistency and . . . predictability”146 previously endorsed by the Court. Its failure to do so in the Jan Mayen case is disappointing.

In theory, the Court is called upon to draw connections between state practices when it searches for customary international law. A fundamental assumption of that law is that linkages can be drawn between autonomous actions of states. This is difficult, indeed, since all actions of states have political and other dimensions. But those dimensions do not necessarily disqualify them from serving as evidence of state practice. Increasingly, the Court’s judgments avoid analyzing state practice before pronouncing on customary law. Rather, as I argued in a prior issue of this Journal, it has turned to other, more readily available information to find general international law, whose establishment is not necessarily dependent on positive state practice.147 But general international law derives from resolutions of

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139 See 1 Nor. Counter-Memorial, supra note 30, at 71–72, 160, paras. 250–52, 553; Tresset Oral Presentation, supra note 39, at 46–51 (pt. 4); Haug Oral Presentation, supra note 95, at 34, 66–67 (Jan. 18, 1993); Tresset Oral Presentation, supra, at 13–17 (Jan. 27, 1993).
140 Jan Mayen, 1989 ICJ Rep. at 70–77, para. 86.
141 Id. at 47, para. 18. The parties were in agreement with respect to this limitation.
142 Id. at 55, para. 37.
143 Id. at 76, para. 85.
144 Arguably, maritime boundary settlements would become more difficult if the Court drew more from state practice in the course of deciding maritime boundary disputes. The precedent-setting impact would add a complication to an already-complicated issue. To the contrary, state practice as a key element in international lawmaking is pervasive and has not been considered an unacceptable threat to negotiated settlements of international disputes. In fact, the resulting focus on state practice may help to define the limits of disputes and the context for their solutions. That may limit the number of disputes that will arise and the range of differences between the parties. While facilitating the development of solutions.
145 Thus, in the North Sea all the other coastal states had an interest in limiting the seaward spread and reach of the Federal Republic of Germany. Only international law declared by the ICJ in the North Sea Continental Shelf cases kept those interests in check and preserved Germany’s rights. See the three recent in Anderson’s INTERNATIONAL MARITIME BOUNDARIES, supra note 104.
146 Libya/Malta, 1985 ICJ Rep. at 39, para. 45.
147 E.g., the distance between Iceland and Jan Mayen is greater, the socioeconomic conditions of Iceland and eastern Greenland are different, and the settlement was the product of a conciliation that resulted in the establishment of a joint development zone. Iceland/Norway, supra note 56; Anderson, supra note 56, at 1755.
148 For a study of the international maritime boundary settlements, see INTERNATIONAL MARITIME BOUNDARIES, supra note 2.
149 1 Nor. Memorial, supra note 38, at 91–95, paras. 289–93, 1 Nor. Counter-Memorial, supra note 30, at 176–83, paras. 619–58.
152 Jonathan I. Cohn, infra note 71.
international organizations, treaties and other consensus-reporting declarations that contain normative rules. Unfortunately, in maritime boundary law and practice no such articulations exist. In their absence the Court has little choice but to consider the evidence of state practice to flesh out the relatively general statements of the law. The state practice will not readily give guidance to the Court. The international maritime boundary study made clear how difficult this task may be.\(^\text{148}\)

Nevertheless, the Court should begin to take account of the rich information available to it about the maritime boundary settlements. It may find that in situations highly similar to the one before it certain types of solutions are common or trends exist that present themselves as appropriate for use in the instant case. Reliance on that information would strengthen the authority of the Court’s judgments and at the same time promote convergence toward more coherent maritime boundary law. Its own call for a degree of predictability and certainty in maritime boundary law makes it incumbent on the Court to facilitate this result through an increasing convergence of its judgments and reliance on the maritime boundaries established by agreement whenever possible.

Compulsory Jurisdiction of the ICJ

Finally, perhaps the element of the Jan Mayen case that might have been most damaging to the advancement of maritime boundary law and practice was the effort by Norway to establish that the ICJ should exercise prudence and not delimit the boundary between Jan Mayen and Greenland.\(^\text{149}\) This appeal was based on the fact that the case was brought unilaterally by Denmark under the compulsory jurisdiction of the Court and not on the basis of a contemporary mutual agreement. Norway argued that maritime boundary delimitation is so difficult, so technical, and so fraught with danger that the Court should only declare the principles on which the delimitation should be based. It should avoid delimiting the boundary itself, absent mutual agreement by the coastal states to submit that very dispute to the Court for delimitation. Norway also argued that international maritime boundary law requires states only to settle their maritime boundaries by agreement and not according to any specific rule or principle.\(^\text{150}\)

The Court rejected these arguments and proceeded to delimit the boundary. It found a duty to decide the dispute on the basis of the applicable international law. Thus, the obligation to establish the maritime boundary by agreement was construed as merely a preliminary obligation; once efforts to negotiate a settlement were exhausted, the substantive international maritime boundary law became applicable and provided the rules pursuant to which the boundary must be delimited. In the end, the judgment defined the maritime boundary line by straight lines connecting points identified by geographical coordinates so that only technical questions remained.\(^\text{151}\)

Had the Court accepted Norway’s argument that the only norm of international law applicable to international maritime boundary delimitations was the duty to attempt to negotiate an agreement, it would have diminished the influence of the maritime boundary jurisprudence that the Court and ad hoc tribunals have developed over the last quarter of a century. That jurisprudence would have been relevant only to the extent that the contesting states agreed to apply it to their specific dispute. If successful in its argument, Norway would also have removed some of the important benefits of international adjudication from the field. The Court’s availability to render maritime boundary delimitations has served to promote boundary settlements. Its compulsory jurisdiction, when available, and its willingness to make delimitations without special restrictions have encouraged states to settle their maritime boundary disputes and, failing that, to invoke third-party processes. In no prior case in which the merits were reached did the Court face insoluble difficulties when rendering a maritime boundary delimitation.\(^\text{152}\) That success was not due to the fact that the cases were brought pursuant to special agreements. In the past, the Court has engaged experts to assist it in the technical execution of the delimitations as necessary, and it may do so in the future. There is no practical reason why the Court should withdraw from these matters in cases brought under its compulsory jurisdiction and it was wise to have rejected such arguments in this case.

IV. Conclusion

The recent trio of international maritime boundary decisions is addressed to fundamental maritime boundary law, practice and procedure. The decisions carry forward the common-law approach to that law. They mark important advances and refinements in the law, which, in turn, will promote the settlement of maritime boundary disputes. For the most part, they have focused attention on coastal geography and have analyzed that information by use of increasingly structured and uniform procedures and techniques. This progress is strengthened by the ICJ-endorsed merger of the equidistance/special circumstances rule of the 1958

\(^{148}\) See Charney, supra note 3, at xii.

\(^{149}\) Nor. Counter-Memorial, supra note 30, at 197, para. 704; Nor. Rejoinder, supra note 38, at 192, para. 654; Haug Oral Presentation, supra note 95, at 12–14 (Jan. 15, 1993); id. at 57–59 (Jan. 27, 1993).

\(^{150}\) Oral Presentation by Mr. Higbet, Agent for Norway, Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), ICJ Verbatim Record at 58–78 (Jan. 21, 1993).

\(^{151}\) Jan Mavin, 1993 ICJ Rep. at 75, 81, paras. 89, 93.
Continental Shelf Convention and the relevant circumstances/equitable result rule of contemporary general international law, the rehabilitation of the equidistant line, and the de facto application of the single maritime boundary. The Court is now in a position to make further contributions that will promote greater consistency and predictability in these matters.

Unfortunately, the most recent Judgment, in the *Jan Mayen* case, may also be interpreted to emphasize the uniqueness of each delimitation more than the commonalities among the delimitations. Even the role of proportionality is less clear after this decision because of the unusual way that consideration was applied. Thus, progress may have been accomplished at the cost of some recidivism. In the future, the International Court of Justice should not shrink from its unique role in this area as a primary vehicle for law development. Of course, the most difficult task for the Court and other tribunals is to find the optimal balance between the inherent individuality of every case and the consistent application of generally relevant procedural and substantive law. That balance can be reached in a more principled way if the focus of attention is on coastal geography and methods that help to analyze those facts. Such analyses may draw upon previously established maritime boundaries in similar circumstances as well as principles and methods of analysis developing from the maritime boundary jurisprudence. All things considered, this recent trio of maritime cases represents a positive development.

*Judge Weeramantry,* in his lengthy separate opinion, focused primarily on equity in international law, and especially in maritime boundary law. He argued that equity is a legitimate and traditional basis for decisions in adjudications of international disputes. While he also recognized that the Court plays an important legislative role in international maritime boundary law, he argued that it is too early for convergence toward more determinative law. *Jan Mayen,* 1993 ICJ Rep. at 214, 276–77, paras. 2, 240 (Weeramantry, J., sep. op.). There are grounds to demur. In the last 50 years, there have been more separate international adjudications and arbitrations on this subject of public international law than on any other. Furthermore, approximately one-third of the potential maritime boundaries have already been settled by agreement or otherwise. If now is too early, when would it be time?